IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3051 OF 2004
IN
SUIT NO.2964 OF 2004

M/s.National Buildings Construction Corporation Limited ...Plaintiff

Versus

M/s.Royal Palm India Pvt. Ltd. ...Defendant

Shri A.K.Singh i/by Ms.A.V.Latne for the Plaintiff.

Shri P.A.Jani i/by Vigil Juris for the Defendant.

CORAM : ABHAY S.OKA, J.
DATED : AUGUST 27, 2007.

P.C.:

1. Heard the learned counsel appearing for the Plaintiff in support of Notice of Motion. I have also heard the learned counsel appearing for the Defendant.

2. The Plaintiff has filed the suit for recovery of money and for return of the plant and machinery alongwith raw-material lying at the site.

3. The Plaintiff is a Government of India Enterprise. The Plaintiff is a company registered under the Companies Act, 1956. The Plaintiff was appointed as a contractor for construction of a building in the property of the Defendant. The Defendant gave notice of termination dated 07th August, 2004 invoking the clause

No.22 of the Agreement between the parties. It is the case of the Plaintiff that by letter of the same date the Defendant pointed out certain non existence defects in the work which were never pointed out earlier. It is the case of the Plaintiff that by letter dated 09th August, 2004 the Defendant surreptitiously tried to introduce changes in clause No.9 of the contract conditions thereby changing the terms of the payment as agreed between the two parties. According to the case of the Plaintiff by a letter dated 12th August, 2004 once again the Defendant used coercive tactics to include new clauses in the agreement for covering up their lapses. The Plaintiff rejected the changes proposed by the Defendant by sending the letter dated 19th August, 2004 to the Defendant. A second notice of termination of contract was issued by the Defendant on 04th September, 2004 to the Plaintiff. The contention of the Plaintiff is that the termination of the contract by the Defendant is unilateral, malafide and illegal. It is the case of the Plaintiff that the Defendant is liable to pay a sum of Rs.46,37,806/- as per the particulars of claim annexed to the plaint.

4. The present Notice of Motion is taken out for interim relief. Prayer clause (a) is for a direction to return the plant and machinery alongwith raw material

lying at the site to the Plaintiff. The second prayer is for temporary injunction restraining the Defendant from entering into any new contract unless and until the measurement work is done as per the terms of the agreement and payment is made to the Plaintiff. The third prayer is for an appointment of a court commissioner for taking measurements as agreed in contract on percentage rate basis. The fourth prayer is for a direction to the Defendant to make payment of Rs.36,28,158/- towards labour payment. In the Notice of Motion, this Court granted ad-interim relief in terms of prayer clause (b) which was ordered to be continued till the disposal of the Notice of Motion. On 09th September, 2005 the Notice of Motion was dismissed in default. By order dated 16th April, 2007 this Court restored the Notice of Motion. However, ad-interim relief granted earlier was not restored.

5. The larned counsel for the Plaintiff submitted that it is a clear case of wrongful termination of the contract. He submitted that the measurements of the work done are not carried out as required by the terms of the contract. He submitted that this is a fit case for appointing a commissioner for taking measurements as agreed in the contract on percentage rate basis. He submitted that till the commission work is carried out,

the further work cannot proceed. He pointed out that though the Defendant has collected 90% of the payment from the allottees, the amount payable to the Plaintiff has not been paid. The learned counsel appearing for the Defendant invited my attention to averments made in the affidavit in reply and in particular in paragraph No.5 thereof in which it is stated that the work of measurement has been already carried out. He submitted that as work of measurement is carried out, no case is made out for appointing the court commissioner. He pointed out that there is no rejoinder filed by the Plaintiff to the said affidavit in reply. The learned counsel for the Plaintiff submitted that the measurement is not carried out as required by the terms of the contract.

6. I have carefully considered the submissions. In so far as the first prayer for return of plant and machinery alongwith raw-material is concerned, in the affidavit in reply the Defendant has stated that on the basis of order dated 21st September, 2004 passed by this Court, the Plaintiff started removing from the site its plant, machinery and raw-material. It is stated that the Defendant has not in any manner obstructed or is obstructing the removal of the plant, machinery or raw-material by the Plaintiff. In view of this

statement made on oath, no case is made out for grant of interim relief in terms of prayer clause (a).

7. In so far as prayers (b) and (c) are concerned, in paragraph No.5 of the affidavit in reply the Defendant has stated thus:

> "I say that in Clause 26 of the Agreement date 09th June 2004 entered into between the Plaintiff and the Defendant it is provided that for all the work executed by the Plaintiff under the contract it should be finally measured by the Architect/Engineer in charge and the Plaintiff shall have an opportunity to be present at the time of such final measurement and take such note and measurement as the Plaintiff may require. **I say that it is agreed between the Plaintiff and the Defendant that final measurement taken by the Architect/Engineer in charge is final and binding upon the Plaintiff and the Defendant. I say that the measurement of the suit contract work has been carried out by the Plaintiff as also the Architect/Engineer. In the circumstances I say that since the Plaintiff has completed the measurement there is now no need**

> **for appointment of Commissioner to measure the work**. I say that after the measurements were completed it was for the Plaintiff to submit its Bill. I say that the Plaintiff has till date not submitted its Bill".(Emphasis supplied)

This part of the reply has not been challenged by the Plaintiff by filing any rejoinder. Therefore, the statements made in the reply on oath will have to be accepted. Therefore, prayer (c) cannot be granted. The Plaintiff who is a building contractor whose contract has been terminated and therefore, injunction as prayed in prayer clause (b) cannot be granted. The grant of prayer (d) will amount to passing a money decree at this stage. Hence, the said prayer cannot be granted.

8. In so far as measurements are concerned, the Plaintiff can always lead appropriate evidence at the stage of trial and take out appropriate proceeding in that behalf.

9. There is no merit in the Notice of Motion and the same is accordingly dismissed.

JUDGE